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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re AbleNet, Inc.

Serial No. 78120762

Elizabeth D. Lewen of Sherrill Law Offices, PLLC for
AbleNet, Inc.

Linda E. Blohm, Trademark Examining Attorney, Law Office
110 (Chris A. F. Pedersen, Managing Attorney).

Before Quinn, Hairston and Rogers, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by AbleNet, Inc. to
register the mark shown below



for an "electronic educational device with sound recording and play-back units and a plurality of switches for use in combination with a standard publication namely, a book, to provide audible play-back of text read from a designated page or facing pages of the publication by activating a designated switch from the plurality of switches."¹

The Trademark Examining Attorney² has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, if applied to the identified goods, would so resemble the previously registered mark BOOKWORM for an "electronic hand-held Braille reading device used for translating Braille,"³ as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs on the case. We reverse the refusal to register.

Our determination under Section 2(d) of the Act is based on an analysis of all the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours and

¹ Application Serial No. 78120762, filed April 10, 2002, which alleges a bona fide intention to use the mark in commerce.

² The present Examining Attorney was not the original Examining Attorney in this case.

³ Registration No. 2,438,958, issued March 27, 2001.

Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key factors are the similarities/dissimilarities between the marks and the similarities/dissimilarities between the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to a consideration of the respective marks, we find that they are similar to the extent that they share the word BOOKWORM. However, there are specific differences in the marks. Registrant's mark is simply the word BOOKWORM whereas applicant's mark consists of BOOKWORM along with a prominent and fanciful design of a worm reading a book and applicant's name "AbleNet."

Turning next to a consideration of the respective goods, it is well settled that goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods or services are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources

of the respective goods or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991); and In re International Telephone & Telegraph Corp., 197 USPQ2d 910 (TTAB 1978).

Applying these principles to the present case, we find that the Examining Attorney has failed to establish that applicant's and registrant's goods are similar or related in any way that would result in source confusion.

Applicant's goods are an "electronic educational device with sound recording and play-back units and a plurality of switches for use in combination with a standard publication, namely, a book, to provide audible play-back of text read from a designated page or facing pages of the publication, by activating a designated switch from a plurality of switches." Registrant's goods are an "electronic hand-held Braille reading device used for translating Braille."

The Examining Attorney contends that the goods are related because "[t]he function of each of these products is to enhance a users [sic] ability to read a publication." (Brief, p. 6). According to the Examining Attorney, a non-sighted person could very well avail him or herself of applicant's product, and both applicant's and registrant's goods may be sold in electronic stores, bookstores and other specialty stores. The Examining Attorney has

submitted a printout of a newspaper article about applicant which indicates that applicant produces products for persons with disabilities.

Notwithstanding the Examining Attorney's contentions, we are not convinced that applicant's and registrant's goods would travel in the same channels of trade to the same class of purchasers. It is obvious that the class of purchasers of registrant's electronic hand-held Braille reading device used for translating Braille is non-sighted persons. While applicant's identification of goods contains no limitations as to class of purchasers, i.e., non-sighted persons are not excluded, it nonetheless seems to us that an electronic educational device with a plurality of switches and a book with regular text is not the type of device that would usually be marketed to non-sighted persons. In point of fact, there is no evidence in the record to indicate that this type of device is marketed to non-sighted persons. Further, although it appears that applicant produces products for persons with disabilities, there is no evidence which suggests that applicant produces products for non-sighted persons. The respective goods, as identified, do not appear to be competitive or complementary, and there is no evidence on which we may conclude that the goods are otherwise related in any way.

Further, there is no evidence that the types of goods involved in this case travel in the same channels of trade. In view of the highly specialized nature of registrant's electronic hand-held Braille reading device, we are not persuaded that this type of device would be sold in electronics stores and bookstores, or even the same "specialty" stores as applicant's goods. However, even assuming that applicant's and registrant's goods would be sold in the same specialty stores, i.e., stores specializing in products for persons with disabilities of all types, it would appear that purchasers of registrant's highly specialized device would be knowledgeable with respect to the source of electronic devices for reading Braille, and thus are likely to know that a company offering an electronic educational device and a standard book is not likely to be the source of electronic devices for reading Braille.

In sum, in view of the specific differences in applicant's and registrant's marks and because the goods are not sufficiently related, we find that there is no likelihood of confusion in this case.

Decision: The refusal to register under Section 2(d) is reversed.

Rogers, Administrative Trademark Judge, dissenting:

I agree with the majority's conclusion that the applicant's mark and the mark in the cited registration are similar. Moreover, because the involved identifications of goods include products that would be marketed to blind or visually impaired individuals, the identical pronunciation of registrant's mark, BOOKWORM, and the clearly dominant portion of applicant's mark, ABLENET BOOKWORM and design, is particularly significant.

As for the goods and prospective purchasers or users thereof, I start with the cited registration and its identification, which reads "electronic hand-held Braille reading device used for translating Braille." Braille is defined as "a system of lettering, devised by [Louis] Braille for use by the blind, in which each character is a combination of raised dots that are read by touch" and "to write in Braille characters." The Random House College Dictionary 163 (revised ed. 1982). Registrant's hand-held device for translating Braille could be a device that would translate Braille characters to visually readable text, perhaps as an item that a sighted person might use to read something written in Braille by a blind or visually impaired person. On the other hand, the device could be a

hand-held speech synthesizer that would translate Braille into audible sounds for a blind or visually impaired person to listen to. Because our analysis of likelihood of confusion must be based on the identification as written in the registration, we must conclude that it could encompass both of the items I have described, even if independent investigation might reveal that the registrant actually uses its mark for only one of these items or, for that matter, something different that I have not contemplated by my reading of the identification.

As for applicant's identification, it specifies that applicant's product is an "electronic educational device with sound recording and play-back units and a plurality of switches for use in combination with a standard publication namely, a book, to provide audible play-back of text read from a designated page or facing pages of the publication by activating a designated switch from the plurality of switches." While this is a lengthy identification, it still is not entirely clear what the product does.

However, I construe the identification to include any item that "reads" the designated page or pages of a book, synthesizes the text into speech and records it, allowing the user to play the recording back as needed. Such an item would be especially useful for a blind or visually

impaired person wanting to read a particular book, without having to search out a recording by some individual reading the book aloud. For example, a blind or visually impaired student could use the device to help read a textbook. I would so construe applicant's identification even if the record did not reveal that applicant markets products for the disabled (including, presumably, the blind or individuals suffering from disabling illness or injury affecting their vision).

In short, I view the involved identifications each as encompassing devices that can help blind or visually impaired individuals read books, whether they are in Braille or in printed form, by creating an audible English version. Thus, even if the products would not be competitive, in that one is used to translate Braille, while the other is used to transform text into sound, they both would be marketed to the same class of prospective purchasers. In addition, since neither identification includes a restriction on channels of trade, we must presume that the identified goods can be marketed in any channel of trade that would normally be used to market products of this type to blind or visually impaired individuals, i.e., the goods could be marketed in the same channels of trade.

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On this record, I would affirm the refusal of
registration under Section 2(d) of the Lanham Act.